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10 **UNITED STATES DISTRICT COURT**
11 **SOUTHERN DISTRICT OF CALIFORNIA**

12 UNITED STATES OF AMERICA,

13 Plaintiff,

14 v.
15

16 JEAN FRANCOIS PICARD (2),

17 Defendant.
18

Case No. 16CR1409-H

**RESPONSE IN OPPOSITION TO
DEFENDANT PICARD'S MOTION
TO DISMISS THE INDICTMENT**

Date: January 23, 2017

Time: 2:00 pm

19 The United States, by and through Alana Robinson, Acting United States Attorney,
20 and Valerie H. Chu, Assistant United States Attorney, hereby files this response in
21 opposition to Defendant Picard's Motion to Dismiss the Indictment. As set forth below,
22 the conduct of the government was not outrageous and the motion to dismiss should be
23 denied.

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I**INTRODUCTION**

Defendant Picard complains that the government's use of made-up patient information and an allegedly cooperating doctor was outrageous. This is akin to a drug dealer, caught in a "buy-bust" scheme, complaining that the undercover cop isn't actually a drug addict. Nothing about the investigation in this case "shocks the conscience" such that Picard's due process rights were violated. To the extent Defendant is actually claiming that he was a victim of entrapment, he bears the burden of production before he may raise this as a defense at trial. The motion to dismiss should be denied.

II**STATEMENT OF THE CASE****A. PRIOR PROCEEDINGS**

On June 16, 2016, a federal grand jury returned a 14-count indictment charging PICARD and his co-defendants with conspiracy, in violation of 18 U.S.C. § 371, honest services mail fraud, in violation of 18 U.S.C. §§ 1341 and 1346, the Travel Act, in violation of 18 U.S.C. § 1952, aiding and abetting, and criminal forfeiture.

The indictment alleges that defendants engaged in a \$34 million kickback and bribery scheme through which co-conspirators paid bribes and kickbacks to doctors to write prescriptions for compound creams or make referrals for durable medical equipment, and then to submit them to specific pharmacies and companies to be filled.

As part of the scheme, according to the indictment, Defendant Picard and his co-conspirators paid doctors to recommend certain goods and services, and to refer patients to specific providers for those goods and services. These included compound creams, custom-blended medications that were supposed to be provided to patients who could not tolerate standard medications in pill form. These specialty compounds required a doctor's prescription to specify the exact nature and dosage the patient needed.

The indictment alleges that, to conceal the nature of the illegal kickbacks, Defendant and his co-conspirators inserted intermediaries (calling them "marketers") to

1 hide and obscure the flow of payments to doctors, disguising the fact that they were
2 unlawful, volume-based, per-patient referral fees. ¶ 16(i). Indictment p. 5, ¶ 16 (a),
3 (c),(d), (e).

4 Among the overt acts specifically alleged against Picard are the following:

- 5 1) On August 9, 2012, Picard offered to pay a marketer (“Marketer 1” or “M1”)
6 \$125 per compound cream prescription M1 could get a doctor to prescribe.
- 7 2) On August 20, 2012, Picard specifically offered to pay M1 a “guaranteed 200
8 [dollars] per script,” referring to compound cream prescriptions.
- 9 3) On December 12, 2012, Picard offered M1 a 25% kickback of the proceeds on
10 compound creams that M1 could get doctors to prescribe.
- 11 4) In March 2013, Picard explained to M1 that the compound creams cost around
12 \$20 to produce, but that they could bill the insurance company \$3,000 for a
13 “five-pack” of pharmaceuticals that were formulated to contain the highest-
14 priced medications.
- 15 5) In March 2013, Picard directed M1 to fax the prescriptions to a fax number for
16 New Age Pharmaceuticals.
- 17 6) On March 26, 2013, Picard called M1 to ask for patient details about the
18 prescriptions supplied by the marketer, so those prescriptions could be billed to
19 the Department of Labor.

20 See Indictment ¶ 17 (a) – (g).

21 **B. INVESTIGATION**

22 Unbeknownst to Picard at the time, the marketer to whom Picard offered to pay
23 \$125 and then \$200 for prescriptions was cooperating with the government, and recorded
24 their meetings. Also unbeknownst to Picard, the prescriptions that were faxed to the fax
25 number supplied by Picard contained made-up patient information.

26 But Picard was working on behalf of a real pharmacy. The pharmacy to which
27 Picard had directed the prescriptions be faxed actually filled the prescriptions, and mailed
28 the compound creams to an undercover address (from which federal agents retrieved the

1 pharmaceuticals). After the prescriptions were filled, Picard paid M1 over \$1,000 for
2 three prescriptions.

3 Picard's own words, as reflected over the course of multiple recordings with M1,¹
4 reveal that Picard was already engaged in ongoing and persistent efforts to pay marketers
5 and doctors. Picard was paying to get doctors not only to write prescriptions, but to refer
6 a veritable smorgasbord of high-cost medical treatments. Picard's conversations with M1
7 were not characterized by M1 introducing, then recruiting Picard into a new criminal
8 enterprise, but two professionals negotiating how they could do business to their mutual
9 benefit.

10 For example, in the conversation on August 9, 2012, during which Picard offered
11 the \$125 per cream, Picard and M1 discussed a variety of areas for which Picard would
12 be willing to pay for referrals from doctors. This included not only compound creams,
13 but also spinal surgeries. Picard represented that he was already "heavy" into San Diego:

14 M1: I have guys down in San Diego. You doin' anything down there at all?
Can you work anyone down that way?

15 Picard: I'm pretty heavy down there, yeah.

16 M1: You're heavy down in San Diego?

17 Picard: Yeah.

18 M1: Okay. Alright ahm, you have a surgery center down there or just up
in LA?

19 Picard: Oh I have one in LA, I have one in San Diego.

20 In the same conversation, Picard offered to pay the marketer to get a doctor to refer
21 a spinal surgery to the San Diego surgery center he was working with:

22 Picard: On the, on the facility fee I'm talking about...I'll be able to give you,
23 ah, for a spine [surgery], I'll be able to give you...thirty, on the facility
24 fee.

25 M1: Thirty on the spine?

26 Picard: Thirty on the spine, for a PPO [Preferred Provider Organization health
insurance], yeah.

27 ¹ These recordings have been provided to Defendant in discovery. The transcriptions
28 presented here are approximate.

1 M1: That's a good number.

2 Picard: Yeah.

3 A few days later, on August 20, 2012, Picard and M1 had a wide-ranging discussion
4 about what Picard would pay for various types of services M1 might be able to get doctors
5 to refer to the San Diego surgery center, including epidurals, knee scope, and breast
6 reduction. They also discussed pain medications. Picard reassured M1, "On P-I [Personal
7 Injury cases], dope and uh, dope and epidural. I'll be able to get us a good deal."² M1
8 asked about the potential payments for that, but Picard shifted to discussing what he was
9 offering for compound cream prescriptions:

10 Picard: I'm talking creams...240 bucks each.

11 M1: Each one?

12 Picard: Each one.

13 They discussed Picard's connection with a medical group in Florida. M1 asked
14 what Picard was doing for them:

15 M1: So tell me about this group in Florida. What...And what are you
16 doing? All their spine?

17 Picard: Creams.

18 Picard confided to M1 that he was already doing all of the compound cream
19 prescriptions for the medical group in Florida, and estimated that it was around 2,000
20 prescriptions. M1 asked if Picard were doing many spinal surgery referrals:

21 M1: Creams? You doin' much spine or no?

22 Picard: [Unintelligible ("UI")] much spine.

23 M1: Really?

24 Picard: [UI] my creams are my savings plan [UI]. Why would I...³

25 ² In this arena, pain treatment often involved epidural injections of pain medication
26 and/or high-priced (and highly addictive) opioid prescriptions ("dope" in common
27 parlance).

28 ³ The dialogue in this recording is faint in places. This is the best transcription
currently available.

1 Picard guaranteed \$200 per cream prescription for Workers' Compensation
 2 patients. He offered that he could handle 10,000 cream prescriptions, and boasted, "I
 3 know for a fact, there's nobody out there that can...touch me with a ten-foot pole" in terms
 4 of the price he was offering to pay for the compound cream prescriptions. He disparaged
 5 another marketer's offer: "Cream, I've seen, yea, between [\$]80 to [\$]100, and Katherine's
 6 probably gonna tell you she's gonna give you a hundred," but "there's nobody that can,
 7 like touch my pricing." He later added, "But yeah, the cream is, is phenomenal...and they
 8 [the insurance companies] pay within 15 days. Are you kidding me?"

9 In a March 19, 2013 conversation Picard encouraged M1 to get doctors to specify
 10 high-value medicines in their prescriptions, because, as Picard said, "I pay for what's on
 11 the scrip, so."⁴ To assist with this, Picard offered to generate a prescription pad for the
 12 doctors, pre-printed with the high-value medicines:

13 Picard: I'll customize it for his, you know, so all [the doctor] had to do
 14 is sign. He doesn't have to fill out all that [B.S.]...

15 Of course, the "B.S." Picard was referring to were the specific medications the
 16 doctor was supposed to be selecting for the patient, that required custom blending into
 17 cream form.

18 Another participant in the conversation ("M2") asked Picard about the volume of
 19 Picard's compound cream business:

20 M2: I'm just curious. What are you guys grossing annually with all your
 21 creams?

21 Picard: Monthly or annually?

22 M2: Annually.

23 Picard: Annually it will be about sixty.

24 M2: \$60 million?

25 Picard: Yeah [...] it's been around for a long while...

27 ⁴ Meaning, Picard would pay more for the prescription if it was written for higher-
 28 value medications.

Once Picard convinced M1 to give prescriptions to Picard, Picard explained that the prescription pad had a fax number where the prescriptions should be sent. Picard indicated that the prescriptions would go to a pharmacy in Vegas.⁵ Picard encouraged the marketers to get their doctors to prescribe a total of five medications, and suggested the amount that should be paid to the doctor, in a way that revealed that he knew how much doctors would accept in exchange for these sorts of prescriptions.

M1: So I think we give the doctor \$300 if...if he does all five.

Picard: Oh no. \$200. \$200.

M1: \$200?

Picard: [expletive] yeah.

Picard suggested that the doctors would be happy to get \$200, because they ordinary would receive “[a] buck...150.” (referring to \$150). Picard confirmed that, for the \$200 paid to the doctors, those prescriptions would be billed out at \$3,000 to the insurance companies.

All of these conversations occurred before the dates of the transactions with which Picard has been charged in the indictment.

III

RESPONSE IN OPPOSITION

A. USE OF UNDERCOVER TECHNIQUES IS NOT OUTRAGEOUS

To justify dismissal for outrageous conduct, government acts must be “so grossly shocking and so outrageous as to violate the universal sense of justice.” *United States v. Restrepo*, 930 F.2d 705, 712 (9th Cir. 1991). This is an onerous standard. *United States v. Montilla*, 870 F.2d 549, 551 (9th Cir. 1989) (“the alleged outrageous conduct of Government agents is often pleaded, but is very rarely successful”); *United States v. Rogers*, 751 F.2d 1074, 1076-77 (9th Cir. 1985) (dismissal is a “disfavored remedy”). Dismissal is limited to police conduct involving “unwarranted physical, or perhaps mental,

⁵ Picard subsequently directed the prescriptions be filled by pharmacies in California.

1 coercion” or “those hopefully few cases where the crime is fabricated entirely by the
2 police....” *United States v. Bogart*, 783 F.2d 1428, 1438 (9th Cir. 1986), *vacated on other*
3 *grounds sub nom. United States v. Wingender*, 790 F.2d 802 (9th Cir.1986). “Because we
4 recognize that ‘government agents may lawfully use methods that are neither appealing nor
5 moral if judged by abstract norms of decency,’ we have [interpreted grounds for dismissal
6 for outrageousness] extremely narrowly.” *Montilla*, 870 F.2d at 552, quoting *Bogart*, 783
7 F.2d at 1438.

9 Picard has not cited a single case in which a motion for dismissal was actually
10 granted. Indeed, to the contrary, courts have repeatedly held that the government’s use of
11 undercover agents or informants, and the use of deception by those agents, does not give
12 rise to outrageous government conduct amounting to a due process violation. In *United*
13 *States v. Fernandez*, 388 F.3d 1199, 1237 (9th Cir. 2004), cited in Defendant’s Motion at
14 page 3, for example, the Ninth Circuit denied a motion to dismiss where the government
15 used an informant who continued to engage in illegal conduct, including conspiring to
16 murder a co-defendant. In *United States v. Smith*, 924 F.2d 889, 897 (9th Cir. 1991), also
17 cited at page 3 of Defendant’s motion, the Ninth Circuit held that the government’s use of
18 an undercover agent to encourage an 18-year-old patient in a drug-treatment center to deal
19 illegal drugs was not outrageous government conduct sufficient to violate due process. In
20 *United States v. So*, 755 F.2d 1350, 1352 (9th Cir. 1985), the Court denied a motion to
21 dismiss where the government provided the funds and opportunity to launder money. In
22 *United States v. Ross*, 372 F.3d 1097, 1102, 1109-1111 (9th Cir. 2004), the Ninth Circuit
23 affirmed this Court’s denial of a motion to dismiss for outrageousness where the
24 government agent illegally procured a green card for an informant who lied on his
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1 immigration application, so that the informant could travel internationally to do undercover
2 work. Even where the government contrived a fugitive defendant's expulsion from
3 Panama by revoking his passport and lying to Panamanian police, the Ninth Circuit
4 declined to dismiss for outrageousness. *United States v. Struckman*, 611 F.3d 560, 573-77
5 (9th Cir. 2010).⁶

7 The facts of this case fell far short of the conduct described in those other cases –
8 all of which themselves fell short of a showing of outrageousness. Here, after Picard and
9 M1 struck a deal for compound cream prescriptions, law enforcement agents did not
10 supply the true names, dates of births, social security numbers, and medical conditions of
11 real people to Picard, but instead filled prescriptions with made-up information and signed
12 a doctor's name. Like an undercover agent who pretends to be a drug addict, or a vice cop
13 who pretends to be a prostitute, these efforts by law enforcement agents were nothing
14 more than run-of-the-mill undercover operations.

15 In the absence of any due process violation, a Court cannot use its supervisory
16 powers to dismiss an indictment. *United States v. Simpson*, 927 F.2d 1088 (1991)
17 (although court "was rightfully disturbed by the less-than-exemplary conduct of the

18
19 ⁶ In addition to these examples found by Defendant, courts have denied
20 outrageousness challenges involving, among other deceptive acts: the supply of contraband
21 at issue in the offense, *Hampton v. United States*, 425 U.S. 484, 489 (1976); an agent,
22 posing as a physician, who flirted with the defendant (who was a polio victim and needed
23 money for an operation on her legs), who indicated that he would help her obtain medical
24 treatment, and who asked to purchase ten kilos of cocaine from her, *United States v.*
25 *Montilla*, 870 F.2d 549, 551, 552 (9th Cir. 1989); the commission of equally serious
26 offenses by an undercover agent as part of the investigation, *United States v. Stenberg*, 803
27 F.2d 422, 430 (9th Cir. 1986); the introduction of drugs into a prison to identify a
28 distribution network, *United States v. Wiley*, 794 F.2d 514, 515 (9th Cir.1986); the
assistance and encouragement of escape attempts, *United States v. Williams*, 791 F.2d
1383, 1386 (9th Cir. 1986); use of false identities by undercover agents, *United States v.*
Marcello, 731 F.2d 1354, 1357 (9th Cir.1984); and an offer to repay a drug debt in the U.S.
rather in Colombia and Bolivia that lured luring the defendants into a U.S. jurisdiction,
United States v. O'Connor, 737 F.2d 814, 817 (9th Cir. 1984).

1 government, sleazy investigatory tactics alone ... do not provide a [clear basis] for
2 exercise of the supervisory power”).

3 Picard’s crime was paying illegal kickbacks to a marketer, to get doctors to write
4 certain kinds of valuable prescriptions. Nothing about the specific identity of the patients,
5 or the fact that the prescriptions appeared to be signed by a doctor, changed at all Picard’s
6 offer to pay an unlawful kickback to M1.⁷

7 Simply put, this conduct was not outrageous. It does not shock the conscience. The
8 motion to dismiss should be denied.

9 **B. DEFENDANT CANNOT SHOW ENTRAPMENT**

10 Instead, what Picard appears to be raising is nothing more shocking or unusual than a
11 run-of-the-mill entrapment defense. An entrapment defense has two related elements: (1)
12 government inducement, and (2) lack of predisposition of the defendant to engage in
13 criminal conduct. *Mathews v. United States*, 485 U.S. 58, 63 (1988). A defendant bears
14 the burden of presenting at least some evidence of both elements in order to put an
15 entrapment defense before the jury. *United States v. Spentz*, 653 F.3d 815, 818 (9th Cir.
16 2011).

17 Inducement is the threshold issue in the entrapment defense. Mere solicitation to
18 commit a crime is not inducement. *Sorrells v. United States*, 287 U.S. 435, 451 (1932).
19 Nor does the government’s use of artifice, stratagem, pretense, or deceit establish
20 inducement. *Id.* at 441. The Ninth Circuit has explained that a showing of inducement
21 must consist of an opportunity “plus something else – typically, excessive pressure by the
22 government upon the defendant or the government’s taking advantage of an alternate, non-
23 criminal type of motive.” *Spentz*, 653 F.3d at 819 (citation omitted) (rejecting argument
24 that defendants were induced because government proposed the idea of committing the
25

26 ⁷ This analysis on these facts is simple and does not necessitate extensive review of
27 the six factors set out, e.g., in *United States v. Pedrin*, 797 F.3d 792, 797 (9th Cir. 2015)
28 to weigh outrageousness in “reverse sting” cases, although such analysis would produce
the same result -- that this conduct was not outrageous.

1 robbery, which presented an opportunity to obtain \$2.5 million worth of cocaine for
2 relatively minor risk).

3 The second prong, predisposition, inquires whether the defendant “was an unwary
4 innocent, or, instead, an unwary criminal who readily availed himself of the opportunity
5 to perpetrate the crime.” *Mathews*, 485 U.S. at 53.

6 The Ninth Circuit in *United States v. Mohamud*, 843 F.3d 420, 433 (9th Cir. 2016)
7 suggested five factors to determine whether there was entrapment as a matter of law:

- 8 1) The character and reputation of the defendant;
- 9 2) Whether the government made the initial suggestion of criminal activity;
- 10 3) Whether the defendant engaged in the activity for profit;
- 11 4) Whether the defendant showed any reluctance, and
- 12 5) The nature of the government’s inducement.

13 Here, there is no record of Picard’s character and reputation at the time of his dealings
14 with M1.

15 As to the second factor, the initial suggestion of criminal activity, Picard argues that
16 he had had no prior dealings with M1. While Picard may not have dealt with M1 before,
17 Picard clearly, by his own admissions, had been paying for compound creams for quite a
18 while by the time he offered to pay M1 \$200 per prescription. Picard was familiar enough
19 with the business to know that he paid the highest price among his competitors, how
20 quickly insurance companies paid, and how much doctors would accept. He boasted of
21 handling 2,000 compound cream prescriptions out of Florida, and generating \$60 million
22 annually in business. Moreover, Picard was not only paying for cream prescriptions, but
23 was apparently paying doctors and their marketers to refer spinal surgeries, breast
24 reduction surgeries, epidurals, and other procedures to his surgery center in San Diego.
25 Thus, not only the second *Mohamud* factor, but also the third (profit motive) weigh against
26 entrapment.

27 As revealed by even his own statements, Picard expressed no reluctance to participate
28 in the kickback scheme with M1. In fact, Picard offered that he was “heavy” in San Diego.

1 Picard encouraged and cajoled M1 to generate cream prescriptions. When M1 persisted
2 in discussing spine surgeries, Picard shifted focus to compound creams. Picard sweetened
3 the deal, increasing the amount of the kickback he was willing to pay from \$125 to \$200,
4 if M1 could find Workers' Compensation patients. Picard then offered an alternate
5 business arrangement – a 25% cut instead of a fixed amount. In offering an extensive
6 array of amounts and types of kickback payments, it seems it was Picard who was inducing
7 M1 to participate and not the other way around.

8 Finally, the government did not offer any unreasonable or extreme inducement. M1
9 was not recruiting Picard into a brand-new kickback scheme, introducing another
10 pharmacy that would pay Picard more, or employing untoward emotional or personal
11 pressure. It was Picard – already overseeing 2,000 prescriptions out of Florida -- who
12 appears to have been trying to convince M1 to submit prescriptions (and a whole host of
13 other procedures) and get paid by Picard for them.

14 IV

15 CONCLUSION

16 For the foregoing reasons, the United States respectfully requests that the Court
17 deny Defendant Picard's motion to dismiss the indictment for outrageous government
18 conduct. In the absence of any further showing, the United States moves to preclude
19 Defendant from raising the defense of entrapment at trial.

20 Respectfully submitted,

21 ALANA ROBINSON
22 Acting United States Attorney

23 DATED: January 13, 2017

24 s/ Valerie H. Chu
25 VALERIE H. CHU
26 Assistant United States Attorney
27
28

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

JEAN FRANCOIS PICARD (2),

Defendant.

Criminal Case No. 16cr1409-H

CERTIFICATE OF SERVICE

I, VALERIE H. CHU, am a citizen of the United States and am at least 18 years of age. My business address is 880 Front Street, Room 6293, San Diego, California, 92101-8893. I am not a party to the above-entitled action. I have caused service of the **Response and Opposition to Defendant's Motion to Dismiss** on the parties to this case by electronically filing the foregoing with the Clerk of the District Court using its ECF System, which electronically notifies them.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on January 16, 2017.

s/ Valerie H. Chu